

## Exhibit C

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	X	
	:	
IN RE: ETHICON, INC.	:	MDL No. 2:12-md-02327
PELVIC REPAIR SYSTEM	:	
PRODUCTS LIABILITY LITIGATION	:	DATE: September 26, 2017
	X	

TRANSCRIPT OF MOTIONS HEARING HELD  
BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE  
HUNTINGTON, WEST VIRGINIA

APPEARANCES:

(All counsel appearing by telephone.)

For the Plaintiffs:	Edward A. Wallace Timothy E. Jackson Wexler Wallace Suite 3300 55 West Monroe Street Chicago, IL 60603  D. Renee Baggett Aylstock Witkin Kreis & Overholtz Suite 200 17 East Main Street Pensacola, FL 32502
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For the Defendant:	David B. Thomas Thomas Combs & Spann, PLLC P. O. Box 3824 Charleston, WV 25338-3824
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Court Reporter:	Kimberly Kaufman, RMR, CRR
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Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Cheryl A. Eifert,  
2 Magistrate Judge, United States District Court, Southern  
3 District of West Virginia, in Huntington, West Virginia, on  
4 September 26, 2017, at 9:30 a.m., as follows:

5 MS. TATMAN: We are here in the Ethicon MDL case  
6 2:12-md-02327. This is concerning defendant's motion to  
7 compel discovery or in the alternative to exclude certain  
8 opinion testimony. That's ECF No. 4582.

9 May I please have plaintiff's counsel?

10 MR. WALLACE: Yes, this is Ed Wallace for the  
11 plaintiffs. And I also believe Tim Jackson is on the line.

12 MR. JACKSON: Yes, this is Tim Jackson. I'm on  
13 the line.

14 MS. BAGGETT: Renee Baggett is also on the line.

15 MS. TATMAN: Thank you. Counsel for Ethicon,  
16 please.

17 MR. THOMAS: David Thomas.

18 MS. TATMAN: All right. If that's everyone, I'll  
19 remind you, when you are speaking, to please identify  
20 yourself for the sake of transcript. And one moment for  
21 Judge Eifert, please.

22 THE COURT: Good morning. All right. We are here  
23 today on defendant's motion to compel discovery or in the  
24 alternative to exclude certain opinion testimony. I have  
25 read all of the submissions.

1           Let me ask a couple of questions. I saw where there  
2           was a supplement that was provided by the plaintiffs to the  
3           defendant, but am I correct in understanding that that  
4           supplement does not contain all of the raw data?

5           MR. THOMAS: This is David Thomas, Your Honor.  
6           That's correct. The supplement was published data that was  
7           a summary of that data. We do not have the raw data that  
8           was requested.

9           THE COURT: All right. Let me ask you, Mr.  
10          Thomas, have you made any effort to subpoena that  
11          information?

12          MR. THOMAS: If we're not successful here, we will  
13          go after the co-authors to subpoena the information. We  
14          have not done that pending the outcome of this issue.

15          THE COURT: Okay. So here's where I come down on  
16          this. As far as the standard that you would apply as to  
17          whether or not this information is within the control of the  
18          doctor, I don't think the standard is really set in stone.  
19          I did a review yesterday. It's a bit of a flexible standard  
20          depending on where you are in the country and what circuit  
21          you're in, and even within the Fourth Circuit there's some  
22          disagreement as to what the standard is.

23          Some courts believe that there has to be a legal right  
24          to the materials before you have control of them or there  
25          has to be some close relationship between the person who

1 holds the information and the party that's asked to produce  
2 it: For example, subsidiaries and parent corporations, that  
3 sort of thing.

4 Then there's a series of cases, especially in this  
5 district and in this -- well, mainly this district -- not  
6 just this district, Maryland as well -- where they say as  
7 long as you have the practical ability to obtain the data or  
8 the information, then you do have control over it. So there  
9 is this range and this -- I think it's not entirely clear  
10 what would be the proper standard to use, but honestly I  
11 don't know that that matters a whole lot in the end result  
12 because the fact is that the doctor did testify that he is  
13 able to get this data.

14 And so I don't think we should make a mountain out of a  
15 molehill as far as which standard to apply. I think  
16 probably I'm leaning more toward the practical ability to  
17 obtain the data. When I say that, I don't think that's an  
18 incorrect standard to apply. I don't think it's universal,  
19 but in this case it makes sense to me. And I think it  
20 really makes sense because if you look at Rule 26(a)(2)(B),  
21 the report provided by the expert is supposed to in some way  
22 contain or supply the facts and data considered by the  
23 expert in reaching his or her opinion.

24 Dr. Sculpture (phonetic) also testified that he did  
25 review and consider the raw data. So from that standpoint,

1 I think that the defendants are entitled to the raw data. I  
2 think the defendants are also entitled to the protocol and  
3 photographs that the one physician might have who did the  
4 separation of the fibers, any images, any information about  
5 the specimen. I think all of that is data. It's factual  
6 information that ought to be supplied to the defendant so  
7 that they have an opportunity to undermine the credibility  
8 and reliability of this particular paper.

9 Having said that, I don't think I saw anywhere in the  
10 deposition where the doctor mentioned that he relied on  
11 communications with co-authors or particular review boards  
12 or that he relied on investigator brochures. I don't even  
13 know whether this is the kind of situation where there would  
14 be adverse events for informed consent. So I don't think  
15 the defendants are entitled to those various categories of  
16 information.

17 So I am going to order the plaintiffs to provide to  
18 Ethicon -- or defendant if there's more than just Ethicon --  
19 the raw data, the materials -- the information regarding  
20 specimens, if that exists, the protocols, any photographs,  
21 images that have to do with the fibers that were separated  
22 and used and examined, so that kind of factual information.

23 I'm not going to require the plaintiffs to produce  
24 informed consents, adverse events, investigator brochures.  
25 I think they've already given defendants the submissions and

1 I'm not going to make the plaintiffs produce communications  
2 with co-authors, et cetera.

3 Now, that, to me, takes care of the first issue, and  
4 I'll let either side say whatever they might want to say on  
5 the record about my ruling before I go on to the second  
6 question, which is this supplemental deposition.

7 Who would like to go first? Mr. Thomas, it's your  
8 motion. Is there something you would like to add or say on  
9 the record?

10 MR. THOMAS: No, Your Honor, nothing further.  
11 Thank you.

12 MR. WALLACE: Your Honor, this is Ed Wallace,  
13 plaintiff's counsel, Your Honor, and Tim Jackson, who had  
14 most of the dealings with Mr. Thomas, is also on the line to  
15 address any of the communications between them, but given  
16 Your Honor's ruling I have a few practical sort of  
17 questions/suggestions that we're probably going to need some  
18 guidance on.

19 One of those is the reality of what we do. In other  
20 words, there are, I believe, multiple co-authors, all of  
21 whom may or may not have information who will be required to  
22 spend a lot of time and effort, and including us spending a  
23 lot of time and effort to -- for example, I don't know if I  
24 now have to fly to Toronto to determine whether or not --  
25 you know, what those specimens -- where they're kept now, et

1 cetera.

2 As you know this much of the peer review process so  
3 once the article was written and approved and published, I'm  
4 not sure what those co-authors did with any of that  
5 underlying data. And much like, for example, defendant's  
6 expert who recently, I believe, was published, the question  
7 I have beyond that is what is good for the goose is good for  
8 the gander. We'd love to have all the underlying data for  
9 every article that's ever been published that's relied on by  
10 an expert and I whether or not we're opening up a can of  
11 worms here in that regard.

12 I was just wondering if Your Honor could outline some  
13 of the limits of what this ruling is really is so we don't  
14 get into that because I'd hate to see that start happening  
15 every other week and so forth. Those are really my what I  
16 call two practical concerns.

17 THE COURT: Well, let me say this: What Rule 26  
18 provides is that if the expert considered that data, then  
19 that -- those facts and data need to in some way be  
20 disclosed to the other side. Obviously you're always going  
21 to have proportionality concerns, there's going to be  
22 burdensome arguments and things of that nature. I think  
23 clearly if someone no longer has the data, then there's  
24 nothing to produce.

25 I think in this case, because he testified that he



1       relied on this raw data -- and I looked for that very  
2       carefully because -- I think it's at page 16 of his  
3       transcript. I looked for that very carefully because when I  
4       was reading through some of it, it sounded to me like he  
5       really didn't review or rely on or consider the raw data,  
6       that he had these various other individuals that were the  
7       principal investigators -- and I think there were only  
8       really three other people other than his students that I  
9       understood had any of this information. That being Barry  
10      Rodgers and -- I can't pronounce that person's name, but the  
11      one who actually separated the fibers.

12             My understanding was there were three other people and  
13      it looked at first as though he was going to say I really  
14      didn't do that, I just relied on this, relied on that, but  
15      then at some point he does say at page 16 that he did look  
16      at the raw data and he did consider it. Once he said that,  
17      I think now it's up for grabs because of Rule 26.

18             As far as these other arguments go, none of those  
19      arguments were made in response to this motion so I'm not in  
20      a position to say whether this was too burdensome or whether  
21      it's disproportional. So all of these things have to be  
22      taken sort of case-by-case.

23             I understand your concerned about opening up this whole  
24      issue about always producing the raw data. I would think  
25      for the most part people aren't going to want the raw data

1 because it's not going to add anything and it's just going  
2 to be additional information that you don't really need to  
3 have. Obviously you don't have to produce raw data for  
4 articles that were not written by the expert. That's going  
5 to be impossible to do and that's not something that the  
6 expert would have control over anyway.

7 But in this case, this is what the request was. I see  
8 there's a basis for it. He can get the data. So I think  
9 you need to move on that and see what's out there and how  
10 long it's going to take to collect it.

11 It didn't sound to me like it was going to be all that  
12 hard from what I read. It sounded like most of it was  
13 computerized and it was just stored somewhere. So it may be  
14 nothing more than downloading it on a thumb drive and  
15 sending it to Mr. Thomas, but it's hard for me to tell  
16 because those issues weren't really raised.

17 MR. WALLACE: Your Honor, along those lines I  
18 guess what I'm hearing -- I understand, as you point out,  
19 this is sort of a case-by-case issue. What I'm hearing is  
20 we will, pursuant to your ruling, act promptly, like today,  
21 to uncover exactly where that's at, what we can get and  
22 exactly what he relied on and then we will confer with Mr.  
23 Thomas as soon as possible.

24 If there are issues, for example, of the things that do  
25 come up in discovery like proportionality or burden or those

1 sorts of things, we're obviously not going to waste your  
2 time with what I'll call the trivial stuff, but if there's  
3 something very serious that comes up, we may need to address  
4 that with the court.

5 I'm not going to telegraphing anything because I've had  
6 pretty good dealings with Mr. Thomas, but my concern is I  
7 don't want to turn this in to a 90-day search for everything  
8 under the sun. I want to get this done. I want to get --  
9 your ruling obviously is what it is and it's -- I construe  
10 it narrowly enough that we can get this done pretty quickly.

11 THE COURT: Let me say, Mr. Wallace, that's the  
12 way I'm thinking as well. The impression that I got was  
13 that this would not be that hard to collect and that hard to  
14 get together. I might ask Mr. Thomas, too, to maybe discuss  
15 with his experts what raw data they really think would be  
16 important to impeach the article. I don't know that  
17 everything -- all of the raw data is going to be that  
18 important. Maybe it is. I don't know, but I would say that  
19 there ought to be some effort on the defendant's side to  
20 narrow what it is that you really need and not just collect  
21 a bunch of extraneous information for no other reason than  
22 you feel like you have to have it.

23 I would think your experts would have some idea of  
24 where there might be weaknesses in the study itself and  
25 where the raw data might truly make a difference in the

1 opinions expressed in the article. I would ask you to look  
2 at that and try to work together.

3 If it turns out that this is becoming a huge problem,  
4 don't wait 30 days to come back. Come back in two weeks or  
5 however long -- because I expect you both are going to get  
6 right on it. Aren't you way done with discovery now?

7 MR. WALLACE: Well, I sure hope so.

8 THE COURT: I thought the deadline had expired a  
9 while ago so I don't see this as being something that's  
10 going to take 90 days, but 60 days or even 30 days. I'm  
11 thinking this should be fairly easy to gather because it  
12 sounded like it was all computer-generated data to me, but  
13 if that's not the case --

14 MR. THOMAS: This is David Thomas. I want to just  
15 respond to that briefly. I'll certainly work with Mr.  
16 Wallace. We always have worked well together on these  
17 issues. This has been a two-way street. We've been through  
18 this whole process with one of our experts who published a  
19 study and we produced all the underlying data. And, in  
20 fact, even his assistants who worked on the testing were  
21 deposed. This is something we've been through before on the  
22 defense side and I'd like to think that Mr. Wallace and I  
23 will be able to work through this easily. If not, we'll be  
24 back, but Mr. Wallace and I get along pretty well and I  
25 think we'll be able to work through this.

1           THE COURT: Very good. The second issue is the  
2 deposition. Here is how I am ruling on that. First of all,  
3 the discovery deadline's over so I don't have authority to  
4 extend it to allow you to take a supplemental deposition. I  
5 think Judge Goodwin recently entered an order letting  
6 everybody know that he doesn't want you stipulating around  
7 the deadlines. So obviously I don't have that authority  
8 anyway.

9           But let me add this, even if I did have the authority,  
10 I would not grant that motion for a supplemental deposition  
11 and here's the reason why: He did consider the raw data,  
12 but it's very clear to me in this deposition that he really  
13 relied on these other people to do the work -- the  
14 nitty-gritty work of what area they were the principal  
15 investigator on. I don't think he would really be a  
16 valuable witness in talking about the ins and outs of the  
17 raw data.

18           He obviously looked at it, considered it, but he didn't  
19 perform any of those tests. He didn't set the protocols.  
20 He didn't come up with the figures. He didn't make the  
21 calculation.

22           To me that would just be a waste of time spent on  
23 deposing him about things that he doesn't really have  
24 personal knowledge of, so for that reason I would deny that  
25 anyway, but, of course, the main reason is that discovery is

1 over at this point.

2 Does anybody want to say anything to that?

3 MR. THOMAS: Not at this point, Your Honor. David  
4 Thomas.

5 MR. WALLACE: All right. No, Your Honor. Thank  
6 you. Ed Wallace speaking.

7 THE COURT: All right. So I think that takes care  
8 of everything. I'll do my usual very short order saying we  
9 had a hearing, we discussed it and I'm ruling in accordance  
10 with what was said during the hearing. All right?

11 MR. THOMAS: Thank you, Your Honor.

12 MR. WALLACE: Thank you, Your Honor.

13 THE COURT: Thank you.

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15 (Proceedings concluded at 9:49 a.m., September 26, 2017.)

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## 1 CERTIFICATION:

2 I, Kimberly Kaufman, Official Court Reporter, certify  
3 that the foregoing is a correct transcript from the record  
4 of proceedings in the matter of In Re: Ethicon, Inc., Pelvic  
5 Repair System Products Liability Litigation, MDL No.  
6 2:12-md-02327, as reported on September 26, 2017.

7  
8 s/Kimberly Kaufman, RMR, CRR

October 2, 2017

9 Kimberly Kaufman, RMR, CRR

DATE